In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1372

SAM L. McDONALD, ET AL., APPELLANTS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 67 C 494

SAM L. MCDONALD and ANDREW BYRD on behalf of themselves and all other persons similarly situated, PLAINTIFFS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, DEFENDANTS

$15.
JUDGE AUSTIN

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTION
—Filed March 29, 1967

COUNT I

1.

Jurisdiction is based upon Title 28, United States Code, Sections 1331, 1343(3), 1343(4), 2201, 2202, 2281 and 2284. The amount in controversy exceeds $10,000.00 exclusive of interest and costs. Plaintiff's cause of action arises under the Federal Civil Rights Act, Title 42, United States Code, Section 1983, and under the Fourteenth Amendment to the United States Constitution.

2.

(a) Plaintiffs are Sam L. McDonald and Andrew Byrd. Plaintiffs are duly qualified and registered voters in Chicago, Illinois within the provisions of Chapter 46, Section 3-1, Ill. Rev. Stat. (1965). Plaintiffs are unsentenced inmates of the Cook County Jail, awaiting trial, who are actually incapable of being present at the polls of their

election precincts on election day. Plaintiff Sam L. McDonald is temporarily committed to jail without bail for the alleged offense of murder. Plaintiff Andrew Byrd is temporarily committed to jail for failure to provide bail in the amount of $5,000.00.

(b) Plaintiffs bring this class action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(a) and (b)(2), Federal Rules of Civil Procedure. The class is composed of the unsentenced inmates of the Cook County Jail, awaiting trial, who are duly registered and qualified voters in Chicago, Illinois, and who are actually incapable of being present at the polls of their election precincts on election day, because of their temporary commitment to jail, either without bail or for failure to post bail in a designated amount. This class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The claims of plaintiffs are typical of the claims of the class. Plaintiffs will fairly and adequately protect the interests of the class. In addition, defendants have refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and final injunctive relief with respect to the class as a whole.

3.

This action is brought against the Board of Election Commissioners of Chicago and its three members, to wit: Sidney T. Holzman, Chairman, Marie H. Suthers, Commissioner, and Francis P. Canary, Commissioner, who are charged with the duty of furnishing ballots for elections at which public officials are elected, in Chicago, Illinois.

4.

On March 29, 1967, plaintiffs, and each of them, by their attorney, Stanley A. Bass, made timely application personally to defendants for absentee ballots on the ground that each plaintiff will be physically incapable of being present at the polls of his election precinct on election day, April 4, 1967.

5.

Defendants, acting in accordance with the Illinois statutes applicable to absentee ballots, denied plaintiffs' applications for absentee ballots for the stated reason that neither plaintiff is a person who is unable to be present at the polls of his election precinct because of "physical incapacity", within the meaning of Chapter 46, Sections 19-1 and 19-3, Ill. Rev. Stat. (1965).

6.

The Illinois statutes applicable to absentee ballots are unconstitutional on their face under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, insofar as they require denial of absentee ballots to plaintiffs and other persons similarly situated.

(a) A classification between voters who are medically incapacitated and voters who are judicially incapacitated by reason of temporary commitment to jail, awaiting trial on an alleged offense, either without bail or for failure to provide bail in a designated amount, is arbitrary and an invidious discrimination, and bears no rational or reasonable relation to the salutary purpose of granting absentee ballots to qualified, registered voters who are actually incapable of being present at the polls of their election precinct on election day.

(b) Plaintiffs would be entitled, under Illinois statutes, to absentee ballots if they were temporarily incarcerated, awaiting trial, in a jail in a county other than Cook County.

(c) Plaintiff Andrew Byrd is precluded from voting by an official act, as a direct result of his financial inability, just as effectively as if a poll tax had been levied as a prerequisite to voting.

7.

The appropriate remedy is not to invalidate the entire Illinois statutory scheme applicable to absentee ballots, but rather, to require that absentee ballots be made available to plaintiffs and other persons similarly situated, as well as to those expressly covered by the terms of the statutes.

8.

Plaintiffs have no plain, adequate or complete remedy at law. Unless the relief requested herein is granted, plaintiffs will suffer irreparable injury and harm by virtue of defendants' refusal to act as set forth above.

WHEREFORE, plaintiffs pray:

1. That pursuant to Title 28, United States Code, Sections 2281 and 2284, a three-judge Court be immediately convened to hear and determine this proceeding.

2. That the Court enter a judgment declaring that the Illinois statutes applicable to absentee ballots are unconstitutional on their face under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, insofar as they require denial of absentee ballots to plaintiffs and other duly qualified and registered voters in Chicago, Illinois, similarly situated.

3. That a permanent injunction issue: Restraining defendants and each of them, their agents, employees and attorneys, and all others acting in concert with them, and their successors from refusing to grant timely applications for absentee ballots made by plaintiffs and other duly qualified and registered voters in Chicago, Illinois similarly situated.

4. That pending the final hearing and determination of this class action for declaratory judgment and permanent injunction, this Court enter a preliminary order directing defendants to deliver to the plaintiffs, Sam L. McDonald and Andrew Byrd absentee ballots to be cast in the April 4, 1967 Election for Municipal Offices in Chicago, Illinois.

5. That plaintiffs be given all other relief as the Court may deem appropriate.

COUNT II

1.

Jurisdiction is based upon the doctrine of "pendent jurisdiction". Plaintiffs' cause of action arises under Article VII, Section 1 of the Constitution of the State of Illinois, and under Chapter 46, Section 19-1, Ill. Rev. Stat. (1965).

2-4.

Plaintiffs incorporate and re-allege the allegations contained in paragraphs 2, 3 and 4 of Count I, as and for paragraphs 2 through 4 of this Count II.

5.

Defendants, purporting to act pursuant to the Illinois statutes applicable to absentee ballots, denied plaintiffs' applications for absentee ballots for the stated reason that neither plaintiff is a person who is unable to be present at the polls of his election precinct because of "physical incapacity", within the meaning of Chapter 46, Sections 19-1 and 19-3, Ill. Rev. Stat. (1965).

6.

Article VII, Section 1 of the Constitution of the State of Illinois, provides:

> SUFFRAGE
>
> Qualifications For Voting
>
> Every person having resided in this State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, who was an elector in this State on the first day of April, in the year of our Lord one thousand eight hundred and forty eight, or obtained a certificate of naturalization, before any court of record in this State, prior to the first day of January, in the year of our Lord one thousand eight hundred and seventy, or who shall be a male citizen of the United States, above the age of twenty-one years, shall be entitled to vote as such election.

7.

Chapter 46, Section 19-1, Ill. Rev. Stat. (1965), provides:

Right to vote

Any qualified elector of the State of Illinois (other than one to whom an absentee ballot has been delivered or mailed pursuant to Article 20 of this Act) having duly registered where such registration is required who expects to be absent from the county in which he is a qualified elector or who because of physical incapacity or the tenets of his religion in the observance of a religious holiday will be unable to be present at the polls on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected for any Congressional, State, District, County, Town, City, Village, Precinct or Judicial offices or at which questions of public policy are submitted, may vote at such election as hereinafter in this Atricle provided.

8.

By virtue of the above cited provisions, and because plaintiffs' temporary commitment to Cook County Jail pending trial renders each of them physically incapable of being present at the polls of his election precinct on election day, plaintiffs are entitled, under a liberal construction of the Illinois statutes applicable to absentee ballots, to be furnished an absentee ballot upon timely request.

9.

Defendants refusal to grant plaintiffs' timely applications for absentee ballots violates the Constitution and Laws of the State of Illinois.

10.

Plaintiffs have no plain, adequate or complete remedy at law. Unless the relief requested herein is granted, plaintiffs will suffer irreparable injury and harm by virtue of defendants refusal to act as set forth above.

WHEREFORE, plaintiffs pray:

1. That pursuant to Title 28, United States Code, Sections 2281 and 2284, a three-judge Court be immediately convened to hear and determine this proceeding.

2. That the Court enter a judgment declaring that plaintiffs and other persons similarly situated are entitled, under the Constitution and Laws of the State of Illinois, to absentee ballots upon timely request.

3. That a permanent injunction issue: Restraining defendants and each of them, their agents, employees and attorneys, and all others acting in concert with them, and their successors from refusing to grant timely applications for absentee ballots made by plaintiffs and other duly qualified and registered voters in Chicago, Illinois similarly situated.

4. That pending the final hearing and determination of this class action for declaratory judgment and permanent injunction, this Court enter a preliminary order directing defendants to deliver to the plaintiffs, Sam L. McDonald and Andrew Byrd, absentee ballots to be cast in the April 4, 1967 Election for Municipal Offices in Chicago, Illinois.

5. That plaintiffs be given all other relief as the Court may deem appropriate.

/s/ Stanley A. Bass
/s/ Melvin B. Goldberg

Of Counsel:

CIVIL LEGAL AID SERVICE
Cook County Jail
2600 South California Avenue
Chicago, Illinois 60608
523-0101 ext. 30

UNITED STATES OF AMERICA)
) SS
NORTHERN DISTRICT OF ILLINOIS)

AFFIDAVIT

Sam L. McDonald, being first duly sworn on oath, deposes and says that he has read the foregoing Complaint, that he knows the contents thereof, and that the same are true in substance and in fact.

/s/ Sam Lee McDonald
Affiant

Subscribed and Sworn to
Before me this 29th day
of March, 1967.

/s/ Carrie Beal
Notary Public
My Commission Expires
5-1-70

[SEAL]

UNITED STATES OF AMERICA)
) SS
NORTHERN DISTRICT OF ILLINOIS)

AFFIDAVIT

Andrew Byrd, being first duly sworn on oath, deposes and says that he has read the foregoing Complaint, that he knows the contents thereof, and that the same are true in substance and in fact.

/s/ Andrew Byrd
Affiant

Subscribed and Sworn to
Before me this 29th day
of March, 1967.

/s/ Carrie Beal
Notary Public
My Commission Expires
5-1-70

[SEAL]

Form 300PI

Voter's Number

JUDGES OF ELECTION—This application for a ballot, called the "Certificate of a Registered Voter," must be placed on the application under with other applications.

☐ Challenged

AFFIDAVIT AND APPLICATION FOR BALLOT
(PHYSICALLY INCAPACITATED ELECTOR)

To be voted at the Municipal election in the County of Cook and State of Illinois, in the 49th precinct of the 3rd ward in Chicago Municipality

State of Illinois
County of Cook } ss.

I, Sam L. McDonald, being duly sworn, depose and say that I am a resident of the 49th precinct of the 3rd ward in Chicago Municipality, residing at 4525 South Federal in said city or village in the County of Cook and State of Illinois; that I have lived at said address for five months last past; that I am lawfully entitled to vote in such precinct at the Municipal election to be held therein on April 6, 1967; that I shall be physically incapable of being present at the polls of such precinct on the date of holding such election for the following reasons: I am incarcerated in jail awaiting trial for an alleged offense, for lack of bail.

I hereby make application for an official ballot or ballots to be voted by me at such election if I am so physically incapacitated, and I agree that I shall return said ballot or ballots to the official issuing the same in sufficient time for such official to deliver said ballot or ballots to the proper polling place prior to the closing of the polls on the date of the election.

Sam L. McDonald
Signature of Applicant

P. O. ADDRESS TO WHICH BALLOT IS TO BE MAILED:

4525 South Federal
Name of Street

Chicago,
Name of City

Illinois
Name of State

Subscribed and sworn to by Sam L. McDonald who is personally known to me, before me this 29th day of March A. D. 1967

Official Capacity

REGISTRATION RECORD CHECKED BY _____ Employee

R. of R. C. _____ Initials of Judge Composing Board

RETURN TO: BOARD OF ELECTION COMMISSIONERS, ROOM 806, CITY HALL, CHICAGO, ILLINOIS 60602

13

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PENALTY PROVISIONS

ARTICLE 29A: Secs. 1, 3, & 5 of the Election Laws of Illinois

29A-1. "Any person who knowingly does any act prohibited or fails to do any act required by The Election Code, or who knowingly does any act with the intent that another shall do an act prohibited by The Election Code or fail to do an act or exercise a privilege required or conferred by The Election Code, shall be guilty of an offense within the meaning of Section 2-12 of the Illinois Criminal Code of 1961 and shall be fined not to exceed $5,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or in the penitentiary from one to five years, or both fined and imprisoned."

29A-3. "Any person who makes a false statement, material to the issue or point in question, which he does not believe to be true, in any affidavit or sworn oral declaration required by any provision of The Election Code shall be guilty of perjury within the meaning of Section 32-2 of the Illinois Criminal Code of 1961 and punished accordingly."

29A-5. "Any person convicted of an offense under any provision of The Election Code and sentenced to imprisonment in the penitentiary shall be deemed infamous and shall forever thereafter be rendered incapable of holding any office of honor, trust or profit, of voting at any election, or serving as a juror, unless he or she is again restored to such rights by the terms of a pardon for the offense or otherwise according to the law."

14

Have the Attending Physician or Christian Science Practitioner complete the proper affidavit.

AFFIDAVIT OF ATTENDING PHYSICIAN

State of _____ } ss.
County of _____ }

I, _____, do solemnly swear that I am a physician, duly licensed to practice medicine in the State of Illinois; that I have examined _____; and that I verily believe that he/she will be physically incapable of being present at the polls on the 4th day of April, 1967 for the following reasons: _____

_____

_____
(Signature)

_____
(Date Licensed)

Subscribed and sworn to by _____ who is personally known to me, before me this _____ day of _____, A.D. 1967.

_____
Official Capacity

AFFIDAVIT OF ATTENDING CHRISTIAN SCIENCE PRACTITIONER

State of _____ } ss.
County of _____ }

I, _____, do solemnly swear that I am an authorized Christian Science Practitioner, listed in the Christian Science Journal, living and residing in the State of Illinois; that I am treating _____; and, that I verily believe that he/she will be physically incapable of being present at the polls on the 4th day of April, 1967 for the following reasons: _____

_____

_____ C.S.
Authorized Christian Science Practitioner

Subscribed and sworn to before me by _____ who is personally known to me, this _____ day of _____, A.D., 1967

_____
Official Capacity

15

AFFIDAVIT OF DEPUTY WARDEN

WALTER P. MARKOWSKI, being first duly sworn on oath, deposes and says: I am the Deputy Warden of the Cook County Jail, Chicago, Illinois. I have in my custody one Sam L. McDonald, who was committed to jail on January 18, 1967, for lack of bail, awaiting trial on an alleged criminal offense. His next scheduled court date is March 31, 1967. Further affiant sayeth not.

Walter P. Markowski
Affiant

Subscribed and Sworn to Before me this 29th day of March, 1967.

Jessie Bland
Notary Public

My Commission Expires 5-12-70

Form 300PI

Voter's Number

ORDER OF ELECTION—This application for a ballot, called the "Certificate of a Registered Voter," must be placed on the application binder with other applications.

☐ Challenged

AFFIDAVIT AND APPLICATION FOR BALLOT
(PHYSICALLY INCAPACITATED ELECTOR)

To be voted at the Municipal election in the County of Cook and State of Illinois, in the 28th precinct of the 16th ward in Chicago Municipality

State of Illinois } ss.
County of Cook }

I, Andrew Byrd do solemnly swear that I am a resident of the 28th precinct of the 16th ward in Chicago Municipality, residing at 1111 W. 69th St. in said city or village in the County of Cook and State of Illinois; that I have lived at said address for one year next last past; that I am lawfully entitled to vote in such precinct at the Municipal election to be held therein on April 4, 1967; that I shall be physically incapable of being present at the polls of such precinct on the date of holding such election for the following reasons: I am incarcerated in jail awaiting trial for an alleged offense, for lack of bail money.

I hereby make application for an official ballot or ballots to be voted by me at such election if I am so physically incapacitated, and I swear that I shall return said ballot or ballots to the official having the same in sufficient time for such official to deliver said ballot or ballots to the proper polling place prior to the closing of the polls on the date of the election.

Andrew Byrd
Signature of Applicant

P. O. ADDRESS TO WHICH BALLOT IS TO BE MAILED:

1111 W. 69th St.
Name of Street
Chicago
Name of City
Illinois
Name of State

Subscribed and sworn to by Andrew Byrd who is personally known to me, before me this 29th day of March A. D. 1967

Clerk Asst. Supt.
Official Capacity

REGISTRATION RECORD CHECKED BY _____ Employee for _____ R. of R. C. _____ Initials of Judge Comparing Signatures

RETURN TO: BOARD OF ELECTION COMMISSIONERS, ROOM 802, CITY HALL, CHICAGO, ILLINOIS 60602

5-1-70

17

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PENALTY PROVISIONS

ARTICLE 29A: Secs. 1, 3, & 5 of the Election Laws of Illinois

29A-1. "Any person who knowingly does any act prohibited or fails to do any act required by The Election Code, or who knowingly does any act with the intent that another shall do an act prohibited by The Election Code or fail to do an act or exercise a privilege required or conferred by The Election Code, shall be guilty of an offense within the meaning of Section 2-12 of the Illinois Criminal Code of 1961 and shall be fined not to exceed $5,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or in the penitentiary from one to five years, or both fined and imprisoned."

29A-3. "Any person who makes a false statement, material to the issue or point in question, which he does not believe to be true, in any affidavit or sworn oral declaration required by any provision of The Election Code shall be guilty of perjury within the meaning of Section 32-2 of the Illinois Criminal Code of 1961 and punished accordingly."

29A-5. "Any person convicted of an offense under any provision of The Election Code and sentenced to imprisonment in the penitentiary shall be deemed infamous and shall forever thereafter be rendered incapable of holding any office of honor, trust or profit, of voting at any election, or serving as a juror, unless he or she is again restored to such rights by the terms of a pardon for the offense or otherwise according to the law."

Have the Attending Physician or Christian Science Practitioner complete the proper affidavit.

AFFIDAVIT OF ATTENDING PHYSICIAN

State of _____ } ss.
County of _____ }

I, _____, do solemnly swear that I am a physician, duly licensed to practice
divine in the State of Illinois; that I have examined _____; and
that I verily believe that he/she will be physically incapable of being present at the polls on the 4th day of April, 1967 for the following
reasons: _____

_____

_____ (Signature)

_____ (Date Licensed)

Subscribed and sworn to by _____ who is personally known to me, before me
this _____ day of _____ A.D. 1967. _____ Official Capacity

AFFIDAVIT OF ATTENDING CHRISTIAN SCIENCE PRACTITIONER

State of _____ } ss.
County of _____ }

I, _____, do solemnly swear that I am an authorized Christian Science Practitioner, listed in the Christian Science Journal, living and residing in the State of Illinois; that I am treating _____; and, that I verily believe that he/she will be physically incapable of being present at the polls on the 4th day of April, 1967 for the following reasons: _____

_____

_____ C.S.
Authorized Christian Science Practitioner

Subscribed and sworn to before me by _____
who is personally known to me, this _____ day of _____ A.D., 1967 19

_____ Official Capacity

AFFIDAVIT OF DEPUTY WARDEN

WALTER P. MADOWSKI, being first duly sworn on oath, deposes and says: I am the Deputy Warden of the Cook County Jail, Chicago, Illinois. I have in my custody one Andrew Byrd, who was committed to jail on March 11, 1967, for lack of bail money, awaiting trial for an alleged misdemeanor offense. His next scheduled court date is April 12, 1967. Further affiant sayeth not.

Walter P. Madowski
Affiant

Subscribed and Sworn to
before me this 20th day
of April, 1967.

20

Clarine Reed
Notary Public

My Commission Expires
5-1-70

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 67 C 494

SAM L. MCDONALD and ANDREW BYRD, on behalf of themselves and all other persons similarly situated, PLAINTIFFS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, DEFENDANTS

DRAFT ORDER—March 30, 1967

This cause comes before the Court on motion of the named plaintiffs, Sam L. McDonald and Andrew Byrd, for temporary relief in this matter,

And the Court having jurisdiction over the subject matter and the parties herein,

And it appearing to the Court that the two named plaintiffs, Sam L. McDonald and Andrew Byrd only, should be furnished, as emergency relief pending full hearing and final determination of this cause, absentee ballots to be cast in the Election for Municipal Offices in Chicago, Illinois, on April 4, 1967,

WHEREFORE, it is ORDERED that defendants, through their agents, are directed to deliver to the two named plaintiffs Sam L. McDonald and Andrew Byrd, through their attorney, Stanley A. Bass, absentee ballots to be cast in the April 4, 1967 Election for Municipal Offices in Chicago, Illinois.

ENTER:

/s/ R. B. Austin
United States District Judge

DATED: March 30, 1967

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 67 C 494

SAM L. MCDONALD and ANDREW BYRD on behalf of themselves and all other persons similarly situated, PLAINTIFFS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, DEFENDANTS

ANSWER—Filed April 18, 1967

COUNT I

Now come the Defendants, BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, by their Attorney, STANLEY T. KUSPER, JR., and in Answer to the Complaint for Equitable Relief state as follows:

1.

The Defendants deny each and every allegation of Paragraph 1 of the Complaint.

2.

(a) The Defendants admit that the two named Plaintiffs herein are duly qualified and registered voters in the City of Chicago, Illinois. As to the other allegations contained in paragraph 2(a) these Defendants state that they have no information sufficient to form a belief as to the truth or accuracy of such allegations and they therefore deny same.

(b) These Defendants state that they have no information sufficient to form a belief as to the truth or accuracy of the allegations contained in paragraph 2(b) and they therefore deny same.

3.

The Defendants admit the allegations contained in paragraph 3 of the Complaint. Defendants allege that pursuant to Chapter 46, Article 29A, Section 1; Article 29A, Section 2; Article 29A, Section 5, Illinois Revised Statutes (1965), these Defendants are subject to criminal provisions and sanctions, the violation of each could lead to conviction and sentencing for an infamous crime.

4.

The Defendants admit that on March 29, 1967 Stanley A. Bass presented a purported application for absentee ballot, on behalf of each of the named Plaintiffs, to a clerk in the office of the Board of Election Commissioners. Defendants deny that the application was proper, both in manner of presentation and in substance, and further allege that it was not presented personally by the Plaintiffs herein as required by Chapter 46, Article 19, Section 2, Illinois Revised Statutes (1965).

5.

These Defendants admit the allegations contained in paragraph 5 of the Complaint and allege that they at all times acted in strict compliance with the statutes of Illinois in such cases made and provided, and further allege that their action was the only action permitted by Illinois law.

6.

These Defendants deny each and every allegation contained in paragraph 6 of the Complaint, sub paragraphs (a) through (c) both inclusive. Defendants further allege, in answer to subparagraph (b) of paragraph 6 of the Complaint that Plaintiffs herein would not have been granted absentee ballots if they were temporarily incarcerated in a jail outside of Cook County if the said application for ballot contained the same affidavit of inability of the Plaintiffs to be present at the polls, executed by a deputy warden of the county jail as is the case here, rather than the statutorily required and prescribed affidavits of physicians or Christian Science practitioners.

7.

These Defendants deny each and every allegation contained in paragraph 7 of the Complaint.

8.

These Defendants deny each and every allegation contained in paragraph 8 of the Complaint.

WHEREFORE, these Defendants deny that Plaintiffs herein should have the relief requested in the Complaint by them filed, or any other relief, and respectfully demand that this cause be dismissed.

COUNT II

1.

The Defendants deny each and every allegation contained in paragraph 1, Count II of the Complaint.

2.-4.

The Defendants incorporate and re-allege the answers made and contained in paragraph 2, 3, and 4 of Count I, as and for paragraphs 2 through 4 of Count II.

5.

The Defendants admit that they denied Plaintiffs' applications for absentee ballots. Defendants allege that said refusal was based upon strict compliance with the statutes of the State of Illinois in such cases made and provided, to-wit: Chapter 46, Article 19, Sections 1, 2, and 3, Article 29A, Sections 1, 2, and 5, Illinois Revised Statutes (1965).

6.

The Defendants admit each and every allegation contained in paragraph 6 of the Complaint.

7.

The Defendants admit each and every allegation contained in paragraph 7 of the Complaint.

8.

The Defendants deny each and every allegation contained in paragraph 8 of the Complaint.

9.

The Defendants deny each and every allegation contained in paragraph 9 of the Complaint. Defendants allege that the applications for absentee ballots herein filed by Plaintiffs were not in the requisite statutory form and that Defendants' refusal to grant said applications was in strict compliance and conformity with the Statutes of the State of Illinois.

10.

The Defendants deny each and every allegation contained in paragraph 10 of the Complaint.

WHEREFORE, these Defendants deny that Plaintiffs herein should have the relief requested in the Complaint by them filed, or any other relief, and respectfully demand that this cause be dismissed.

Respectfully submitted,

/s/ Stanley T. Kusper, Jr.
Attorney for Defendants

STANLEY T. KUSPER, JR.
Attorney for Defendants
Room 308 City Hall
Chicago, Illinois 60602
DE 2-3050

OF COUNSEL:

MATTHEW J. BEEMSTERBOER
Attorney at Law
2428 Vermont
Blue Island, Illinois
FU 5-5500.

UNITED STATES OF AMERICA)
) SS
NORTHERN DISTRICT OF ILLINOIS)

AFFIDAVIT

SIDNEY T. HOLZMAN, being first duly sworn upon his oath, deposes and says that he is one of the Defendants in this action, that he has read the foregoing answer by him subscribed, that he knows the contents thereof, and that the same are true in substance and in fact.

/s/ Sidney T. Holzman
SIDNEY T. HOLZMAN

Subscribed and Sworn to
before me this 18th day
of April, A.D., 1967

/s/ Stephanie Stecki
Notary Public

[SEAL]

UNITED STATES OF AMERICA)
) SS
NORTHERN DISTRICT OF ILLINOIS)

AFFIDAVIT

MARIE H. SUTHERS, being first duly sworn upon her oath, deposes and says that she is one of the Defendants in this action, that she has read the foregoing answer by her subscribed, that she knows the contents thereof, and that the same are true in substance and in fact.

/s/ Marie H. Suthers
MARIE H. SUTHERS

Subscribed and Sworn to
before me this 18th day
of April, A.D., 1967

/s/ Stephanie Stecki
Notary Public

[SEAL]

UNITED STATES OF AMERICA)
) ss
NORTHERN DISTRICT OF ILLINOIS)

AFFIDAVIT

FRANCIS P. CANARY, being first duly sworn upon his oath, deposes and says that he is one of the Defendants in this action, that he has read the foregoing answer by him subscribed, that he knows the contents thereof, and that the same are true in substance and in fact.

/s/ Francis P. Canary
FRANCIS P. CANARY

Subscribed and Sworn to
before me this 18th day
of April, A.D., 1967.

/s/ Stephanie Stecki
Notary Public

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 67 C 494

SAM L. MCDONALD and ANDREW BYRD, on behalf of themselves and all other persons similarly situated, PLAINTIFFS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, DEFENDANTS

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT—
Filed May 25, 1967

Plaintiffs, SAM L. McDONALD and ANDREW BYRD, on behalf of themselves and all other persons similarly situated, by their attorneys, Stanley A. Bass and Melvin B. Goldberg, Civil Legal Aid Service, Cook County Jail, respectfully move, pursuant to Rule 56 (a), Federal Rules of Civil Procedure, for a summary judgment in their favor, declaring that the Illinois statutes applicable to absentee ballots are unconstitutional on their face under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, insofar as they require denial of absentee ballots to plaintiffs and other duly qualified and registered voters in Chicago, Illinois, similarly situated, or in the alternative, declaring that plaintiffs and other persons similarly situated are entitled, under the Constitution and Laws of the State of Illinois, to absentee ballots upon timely request; and granting a permanent injunction restraining defendants and their agents from refusing to grant timely applications for absentee ballots made by plaintiffs and other persons similarly situated.

In support of this motion, counsel for plaintiffs state:

1. The allegations of the complaint filed herein have been made under oath by the two named plaintiffs, Sam L. McDonald and Andrew Byrd.

2. Defendants, in their answer, have not controverted the basic material facts, but they have contested the legal conclusions to be derived therefrom.

3. No genuine issue as to any material fact remains to be resolved by an evidentiary hearing or trial.

4. By virtue of the verified complaint, and Exhibits "1" and "2", attached to this motion, plaintiffs are entitled to a summary judgment in their favor, as a matter of law.

WHEREFORE, plaintiffs ever pray that the relief requested in this motion be granted.

Respectfully submitted,

/s/ Stanley A. Bass
STANLEY A. BASS

/s/ Melvin B. Goldberg
MELVIN B. GOLDBERG
Attorneys For Plaintiffs

Of Counsel:

CIVIL LEGAL AID SERVICE
Cook County Jail
Chicago, Illinois 60608
523-0101 ext. 30

UNITED STATES OF AMERICA)
) SS
NORTHERN DISTRICT OF ILLINOIS)

STANLEY A. BASS, being first duly sworn on oath, deposes and says: I caused the above motion for summary judgment to be prepared, and know the contents thereof to be true to the best of my knowledge, information and belief.

/s/ Stanley A. Bass
Affiant

Subscribed and sworn to
Before me this 24th day
of May, 1967.

/s/ Carrie Beal
Notary Public
My Commission Expires
5-1-70

[SEAL]

EXHIBIT "1"

Cook County Jail
2600 South California Avenue
Chicago, Illinois 60608

March 29, 1967

I, Sam L. McDonald, do hereby authorize attorneys Stanley A. Bass and Melvin B. Goldberg of the Civil Legal Aid Service, Cook County Jail, to represent me and act on my behalf in connection with my application to vote in the Election for Municipal Offices of Chicago, Illinois on April 4, 1967.

/s/ Sam McDonald
Affiant

Subscribed and Sworn to
Before me this 29th day
of March, 1967.

/s/ Carrie Beal
Notary Public
My Commission Expires
5-1-70

EXHIBIT "2"

Cook County Jail
2600 South California Avenue
Chicago, Illinois 60608

March 29, 1967

I, Andrew Byrd, do hereby authorize attorneys Stanley A. Bass and Melvin B. Goldberg of the Civil Legal Aid Service, Cook County Jail, to represent me and act on my behalf in connection with my application to vote in the Election for Municipal Offices in Chicago, Illinois on April 4, 1967.

/s/ Andrew Byrd
Affiant

Subscribed and Sworn to
Before me this 29th day
of March, 1967.

/s/ Carrie Beal
Notary Public
My Commission Expires
5-1-70

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 67 C 494

SAM L. MCDONALD and ANDREW BYRD on behalf of themselves and all other persons similarly situated, PLAINTIFFS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, DEFENDANTS

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—
Filed July 31, 1967

Defendants, BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, by Stanley T. Kusper, Jr., and Matthew J. Beemsterboer, their Attorneys, respectfully move pursuant to Rule 56 (b), of the Federal Rules of Civil Procedure, for a summary Judgment in their favor and against the plaintiff and in support thereof, present the affidavit of SIDNEY T. HOLZMAN.

Respectfully submitted,

/s/ Stanley T. Kusper, Jr.

/s/ Matthew J. Beemsterboer
Attorneys for Defendants

STANLEY T. KUSPER, JR.
Room 308—City Hall
Chicago, Illinois
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2428 W. Vermont Street
Blue Island, Illinois
Tele: 385-5500
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 67 C 494

SAM L. MCDONALD and ANDREW BYRD on behalf of themselves and all other persons similarly situated, PLAINTIFFS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, DEFENDANTS

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT—Filed July 31, 1967

I, SIDNEY T. HOLZMAN, Chairman of the Board of Election Commissioners, of the City of Chicago, one of the defendants herein, being first duly sworn upon oath, depose and say that I have personal knowledge of the facts hereinafter set forth and that if sworn as a witness, I could testify competently thereto. I further say that:

1. I admit the allegations contained in Paragraphs 1, 2 and 3 of the affidavit of Stanley A. Bass in support of plaintiffs' motion for summary judgment.

2. Neither of the named plaintiffs submitted the affidavit of attending physician or affidavit of attending Christian Science Practitioner required by Sections 19-2 and 19-3 of Chapter 46, Illinois Revised Statutes (1965) required at a condition for the issuance of an absentee ballot.

3. I deny that plaintiffs are entitled to summary judgment or any other relief.

4. That I refused to authorize the issuance of absentee ballots to the named plaintiffs rather than violate my statutory duties and subject myself to prosecution for an infamous crime punishable by imprisonment not to exceed

five years in the penitentiary and/or a fine of not to exceed $5,000.00 pursuant to the provisions of Section 29 A-1 and 29 A-5 of Chapter 46 Illinois Revised Statutes (1965).

5. That I will grant future applications for absentee ballots unaccompanied by required affidavit made by or on behalf of the named plaintiffs or other similarly situated only when compelled to do so by compulsory process of a court of competent jurisdiction, as I have done on three previous occasions.

/s/ Sidney T. Holzman
SIDNEY T. HOLZMAN

Subscribed and sworn to before me this 31st day of July, 1967.

/s/ Stephanie Stecki
Notary Public

[SEAL]

STANLEY T. KUSPER, JR.
Room 308—City Hall
Chicago, Illinois
De-2-3050

MATTHEW J. BEEMSTERBOER
2428 Vermont Street
Blue Island, Illinois
385-5500
Attorneys for Defendants

IN UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable CASTLE, HOFFMAN and AUSTIN.

Cause No. 67 C 494 Date Dec. 11, 1967

Title of Cause MCDONALD, ET AL. vs. BOARD OF ELECTION COMMISSIONERS, ET AL.

Brief Statement of Motion Advisement

Opinion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel _____

Representing _____

Names and Addresses of other counsel entitled to notice and names of parties they represent _____

Reserve space below for notations by minute clerk
Pursuant to opinion filed herein this day Pltffs' motion for summ judg denied—Defts' motion for summ judg granted and complt is dismd.

Hand this memorandum to the Clerk.

Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 67 C 494

SAM L. MCDONALD and ANDREW BYRD on behalf of themselves and all other persons similarly situated, PLAINTIFFS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, DEFENDANTS

BEFORE: Castle, Circuit Judge, and Hoffman and Austin, District Judges.

OPINION—Filed December 11, 1967

Austin, District Judge.

This action seeks to enjoin the enforcement of the Illinois Election Code because it is unconstitutional insofar as the absentee ballot provisions thereof and defendants' administration thereunder exclude the plaintiffs and others similarly situated from that class of persons entitled to such ballots because of "physical incapacity" to appear at the polls on any election day. Chapter 46, §§ 19-1, 19-2 and 19-3, Ill. Rev. Stats. It is urged that such exclusion violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because a classification between the voters who are medically incapacitated and voters who are judicially incapacitated, by reason of commitment to jail on election day, is arbitrary and an invidious discrimination, and bears no rational or reasonable relation to the salutary purpose of granting absentee ballots to all qualified registered voters who are incapable of being present at the polls on election day.

Plaintiffs and the class they represent are unsentenced inmates confined in the Cook County Jail who cannot appear at the polls either because they are charged with nonbailable offenses or because they have been unable to post the bail imposed by the courts of Illinois. The plaintiff McDonald, who is still awaiting trial, has been charged with the offense of murder and is being held without bail; the plaintiff Byrd, who has since the filing of the complaint been discharged, had been held because of his inability to post the $5,000 bond. Understandably, plaintiffs do not contend that the operation of the bail bond system impinges upon, or results in a constitutional deprivation of, their right to absentee voting privileges.

The named plaintiffs seeking to exercise the voting privilege at an election which was to be held on April 4, 1967, made timely application for absentee Ballots on March 29, 1967 because of their physical inability to appear at the polls on election day. Said applications were accompanied by an affidavit of the Warden of Cook County Jail attesting to such inability. These applications were refused by defendants because their "physical incapacity" did not bring them within the class of persons covered by §§ 19-1, 19-2 and 19-3 of the Illinois statute. Defendants assert that to have honored such requests would subject them to possible imprisonment for a term of five years and/or a fine not to exceed $5,000. Chapter 46, §§ 29A-1, 29A-5, Ill. Rev. Stats. The instant complaint was filed on March 29, 1967. On March 30, 1967, on the basis of *McDonald* v. *Board of Election Commissioners of Chicago*, 265 F. Supp. 816 (D.C. Ill., 1967), this court, before a three-judge court was convened, ordered defendants to issue the ballots requested so that they could be cast in the April 4 election. Both parties have filed motions for summary judgment.

Section 19-1 of the Election Code identifies those persons to whom absentee ballots must be given. They are:

> "Any qualified elector . . . who expects to be absent from the county in which he is a qualified elector or who because of physical incapacity or the tenets of his religion in the observance of a religious holiday

will be unable to be present at the polls on the day of holding of any special, general or primary election . . . may vote at such election as hereinafter in this Article provided."

Section 19-2 provides for the time and manner in which such application must be made. The requirement pertinent to our question is as follows:

> "* * * any such elector who will be absent because of physical incapacity shall submit with his application the certificate of his duly licensed attending physician or a Christian Science practitioner living and residing in the State of Illinois, . . . to the fact that such elector is so physically incapacitated."

Section 19-3 sets forth the format of the applications and the affidavits which must accompany applications for electors qualifying for absentee ballots.

The classes of persons covered by these sections are: (1) those absent from the county, (2) those physically incapacitated, and (3) those whose observance of a religious holiday prevents attendance at the polls. We are concerned with the category of those who are physically incapacitated.

In resolving the issue before us it is helpful to review some of the legislative developments which underlie the grant of absentee voting. Prior to 1917 the Illinois statutes contained no provision for absentee voting and Illinois voters were required to be physically present in order to cast their vote on election day. In 1917 the legislature granted to qualified electors the privilege of absentee voting if they expected to be absent from the county because of their business or duties; and in 1944 that restriction was removed and absence from the county for whatever reason entitled an elector to an absentee ballot. All other qualified electors were still required to appear personally at the polls in order to vote. In 1955 the privilege of casting absentee ballots was extended to those who would be unable to be present because of physical incapacity provided such physical incapacity was attested to by an attending licensed physician or Christian Science practitioner. All other qualified voters, not absent from the

county or physically incapacitated, were required to appear personally at the polls in order to vote. Again, in 1961 the privilege was extended to include those qualified electors whose tenets of religion in the observance of a religious holiday prevented attendance at the polls.

It is conceded by the plaintiffs that the privilege of absentee voting is one within the legislative power to grant or withhold. See also *Hilliard* v. *Park*, 370 S.W. (2d) 829 (Sup. Ct. Tenn., 1963); *Hallahan* v. *Mittlebeeler*, 373 S.W. (2d) 727 (Ky. Ct. App., 1964). Nevertheless, as plaintiffs state, in the exercise of such power to classify persons to whom such privilege is given, no legislature may enact laws which unreasonably and arbitrarily discriminate between persons and thereby deny the equal protection secured by the Fourteenth Amendment to the federal Constitution. Such classification must be reasonable in the light of the statutory purpose. *MaLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964).

It is necessary at the outset that we determine the class of Illinois voter encompassed within the phrase "physical incapacity" as used in § 19-1 of the Election Code. In construing a statute, it is a familiar rule of construction that the intention or meaning of a statute is to be determined not from any single portion, part or section thereof. All the material parts of the statute and all of its provisions and sections are to be considered together. It is the intent as deduced from the whole which governs over that of a particular part or parts considered separately. *Hilliard* v. *Park*, *supra*. Sections 19-2 and 19-3, being in *pari materia* with § 19-1, must also be referred to in order to ascertain the intent of the Illinois legislature. Section 19-2 expressly provides that an elector "absent because of physical incapacity shall submit with his application the certificate of his duly licensed attending physician . . . to the fact of his physical incapacity." And, § 19-3 delineates the forms which shall be substantially followed. These include forms of affidavits by physicians and Christian Science practitioners attesting to the fact that the voter "will be physically incapable of being present at the polls . . . for the following reasons. No form has been provided for an affidavit of an administrator of

a penal institution attesting to the fact that a prisoner "will be physically incapable of being present at the polls . . . for the following reasons." It is also a rule of statutory construction that where a statute enumerates persons affected, it must be construed as excluding from its effect all those not expressly mentioned.

Section 19-1, together with §§ 19-2 and 19-3, persuade us that the class intended to be covered by the phrase "physical incapacity" includes only those voters who for medical reasons are unable to be present at the polls.

For that reason, with regard to Count II of the complaint, we hold that defendants refusal to accept a certificate from the Warden of the Cook County Jail in which the plaintiffs are incarcerated, in lieu of the certificate required by Section 19-2, is a proper interpretation by the Board of Election Commissioners.

It must next be determined whether such a classification by the Illinois legislature is a reasonable one. We do not have the benefit of any Illinois state court decision on this precise point. Three decisions which considered the reasonableness of absentee voter classifications held the classifications created by the particular state statutes to be reasonable and the laws therefore valid exercises of legislative authority.

In *Straughan* v. *Meyers*, 187 S.W. (2d) 1159 (1916), the Supreme Court of Missouri was concerned with a statute which limited the grant of absentee ballots to railroad employees, traveling salesman, and other persons who because of their duties or occupations would be absent from their voting precincts on election day. The privilege of absentee voting was not extended to other electors. In upholding the constitutionality of the limited grant, the court held that because the provision applied alike to all persons who by reason of their business duties were unavoidably absent from the county, it did not come within the purview of prohibited class legislation.

In *Lemons* v. *Noller*, 63 P. (2d) 177 (1936) the Supreme Court of Kansas considered and rejected numerous arguments contesting the validity of a statutory provision which granted the privilege of absentee voting to voters absent from the state. Under the Kansas Election Code,

a voter who was physically disabled and in the state on election day could not obtain an absentee ballot. However, if the voter were absent from the state he could obtain an absentee ballot, whether or not he was physically disabled. Therefore, one of the arguments made was that the classification of absentee voters was unreasonable because voters who are physically disabled and absent from the state on election day could vote by virtue of the fact that they are absent from the state, while voters who are physically disabled and in the state on election day could not vote. The court rejected this argument and held the law constitutional for the reason that such classification was not unreasonable even though it conferred political rights on some to the exclusion of others.

In *Hallahan* v. *Mittlebeeler*, 373 S.W. (2d) 726 (1963) the Court of Appeals of Kentucky interpreted a provision of the state Constitution providing "any person absent from the county of his legal residence, or from the state, may be permitted to vote in a manner provided by law" together with a subsequently enacted statute defining an absentee voter as

> ". . . any qualified voter in the United States services, or bona fide, full time student in residence at an educational institution who expects to be absent from the county . . ."

It was argued that when the legislature grants the privilege of absentee voting it must be extended to every qualified voter who is absent from the county of his residence on election day. The Kentucky court determined that the statute did not violate either the federal or state Constitutions, did not deprive any one of his right to vote, did not impinge upon constitutional guarantees of free and equal elections, and did not constitute special legislation merely because the privilege was extended to only two reasonably qualified groups properly designated as recipients thereof.

We hold that the provisions of the Illinois Election Code which extend absentee voting privileges to those persons who are physically incapacitated because of medi-

cal reasons from appearing at the polls to be a proper and reasonable legislative classification not violative of the Equal Protection Clause of the Fourteenth Amendment.

An order this day has been entered denying plaintiffs' motion for summary judgment, granting defendants' motion for summary judgment, and dismissing the complaint.

/s/ Latham Castle
Judge, United States Court of Appeals

/s/ Julius J. Hoffman
Judge, United States District Court

/s/ Richard B. Austin
Judge, United States District Court

DATED: December 11, 1967

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 67 C 494

SAM L. MCDONALD and ANDREW BYRD on behalf of themselves and all other persons similarly situated, PLAINTIFFS

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed December 21, 1967

I. Notice is hereby given that Sam L. McDonald and Andrew Byrd, on behalf of themselves and all other persons similarly situated, plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order entered in this action on December 11, 1967, granting defendants' motion for summary judgment, and dismissing the complaint.

This appeal is taken pursuant to 28 U.S.C.A. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Complaint
2. Answer
3. Plaintiff's motion for summary judgment
4. Defendant's motion for summary judgment
5. Affidavit in support of defendants' motion for summary judgment
6. Order dated December 11, 1967 granting defendant's motion for summary judgment and dismissing the complaint
7. Opinion filed December 11, 1967
8. Notice of Appeal

III. The following questions are presented by this appeal:

1. Is Equal Protection of the Laws met by Illinois statutes which grant an absentee ballot to a person who is unable to be present at the polls on election day because of either absence from the county, physical incapacity for medical reasons or observance of a religious holiday, but which deny an absentee ballot to a registered and qualified voter who is actually unable to be present at the polls on election day because of judicial commitment to jail in the county of his residence, while awaiting preliminary hearing or trial on an alleged criminal charge?

2. Does refusal by one branch of government, an election board, to grant an absentee ballot to a registered and qualified voter who is actually unable to be present at the polls on election day because of commitment to jail by another branch of government, the judiciary, due to financial inability to provide monetary bail, while awaiting preliminary hearing or trial, effectively constitute deprivation of the right to vote based upon poverty, which this Court held invalid in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966)?

/s/ Stanley A. Bass
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[Proof of Service Omitted in Printing]

SUPREME COURT OF THE UNITED STATES

No. 1320 Misc., October Term, 1967

SAM L. MCDONALD, ET AL., APPELLANTS

v.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, ET AL.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 29, 1968

SUPREME COURT OF THE UNITED STATES

No. 1320 Misc., October Term, 1967

SAM L. MCDONALD, ET AL., APPELLANTS

v.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, ET AL.

APPEAL from the United States District Court for the Northern District of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is transferred to the appellate docket as No. 1372 and placed on the summary calendar.

April 29, 1968

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JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 68

SAM L. McDONALD and ANDREW BYRD, On behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF OF APPELLANTS

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Of Counsel:

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Appellate and Test Case Division
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1372

SAM L. McDONALD, *et al.*,

Appellants,

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE APPELLANTS

Opinion Below

The opinion of the District Court (A. 29-35) is reported at 277 F. Supp. 14.

Jurisdiction

The jurisdiction of the District Court in this case was invoked under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, 42 United States Code Section 1983 and 28 United States Code Sections 1343(3), 2201 and 2202. The judgment of the District Court was entered on December 11, 1967, and notice of appeal was filed in that court on December 21, 1967 (A. 28-37). The appellant's jurisdictional statement was filed on February 13, 1968, and this Court entered an order on April 29, 1968 postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (A. 38) (20 L. Ed. 2d 300). The jurisdiction of the Supreme Court to review the decision of the District Court by direct appeal is conferred by 28 United States Code Sections 1253 and 2101(b).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the United States Constitution provides in relevant part: " . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the Laws."

The validity of the following Illinois statutes is involved: Chapter 46, Sections 19-1, 19-2, and 19-3, Ill. Rev. Stat., pp. 1988-90. Their pertinent text is set forth in the Appendix, *infra*, pp. 15-21.

Questions Presented

I. Is Equal Protection of the Laws met by Illinois statutes which grant an absentee ballot to a person who is un-

able to be present at the polls on election day because of either absence from the county, physical incapacity for medical reasons or observance of a religious holiday, but which deny an absentee ballot to a registered and qualified voter who is actually unable to be present at the polls on election day because of judicial commitment to jail in the county of his residence, while awaiting preliminary hearing or trial on an alleged criminal charge?

II. Does refusal by one branch of government, an election board, to grant an absentee ballot to a registered and qualified voter who is actually unable to be present at the polls on election day because of commitment to jail by another branch of government, the judiciary, due to financial inability to provide monetary bail, while awaiting preliminary hearing or trial, effectively constitute deprivation of the right to vote based upon poverty, which this Court held invalid in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966)?

Statement

This case is before the Court on appeal from an order of dismissal entered by a three-judge court convened pursuant to 28 United States Code Section 2284. The appellants brought this class action for declaratory judgment and injunction, on behalf of themselves and all unsentenced inmates of the Cook County Jail, Chicago, Illinois, awaiting trial, who are registered and qualified to vote in Chicago, Illinois, and who are actually incapable of being present at the polls of their election precincts on election day, because of their temporary commitment to jail in the county of their residences, either without bail or for failure to post bail in a designated amount. Plaintiffs sought a de-

claratory judgment holding invalid, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Illinois statutes which grant an absentee ballot to a person who is unable to be present at the polls on election day because of either absence from the county, physical incapacity for medical reasons or observance of a religious holiday, but which deny an absentee ballot to a member of plaintiffs' class. Alternatively, plaintiffs sought a judgment declaring that plaintiffs are entitled, under Illinois law, to absentee ballots upon timely request. A permanent injunction was sought to restrain defendants, the Board of Election Commissioners of Chicago and its members, from refusing to grant timely applications for absentee ballots made by plaintiffs and other duly qualified and registered voters in Chicago, Illinois, similarly situated.

The facts in this case are not in dispute. On March 29, 1967, the two named plaintiffs, Sam L. McDonald and Andrew Byrd, registered and qualified to vote, and acting through their attorney, Stanley A. Bass, timely applied to defendants for absentee ballots on the ground that each plaintiff would be physically incapable of being present at the polls of his election precinct on election day, April 4, 1967, because of incarceration in Cook County Jail awaiting trial. McDonald had been committed to jail without bail for the alleged offense of murder, and Byrd had been committed to jail for failure to provide bail in the amount of $5,000, on a robbery charge. Defendants, acting in accordance with the Illinois statutes applicable to absentee ballots, denied plaintiffs' applications for absentee ballots for the stated reason that neither plaintiff is a person who is unable to be present at the polls of his election precinct be-

cause of "physical incapacity" within the meaning of Chapter 46, Sections 19-1, 19-2 and 19-3, Ill. Rev. Stat. The complaint in this action for declaratory judgment and injunction was filed on March 29, 1967 (A. 1-12). On March 30, 1967, on the basis of *McDonald* v. *Board of Election Commissioners of Chicago,* 265 F. Supp. 816 (N.D. Ill. 1967), the single District Judge, before a three-judge court was convened, ordered defendants to issue the ballots requested so that they could be cast in the April 4 election (A. 13). After the three-judge court was convened, both parties filed motions for summary judgment (A. 20-27). On December 11, 1967, the three-judge court entered an order denying plaintiffs' motion for summary judgment, granting defendants' motion for summary judgment, and dismissing the complaint (A. 28). From this order, plaintiffs appeal.

ARGUMENT

I.

The Equal Protection Clause of the Fourteenth Amendment Is Violated by Illinois Statutes Which Grant an Absentee Ballot to a Person Who Is Unable to Be Present at the Polls on Election Day Because of Either Absence From the County, Physical Incapacity for Medical Reasons or Observance of a Religious Holiday, but Which Deny an Absentee Ballot to a Registered and Qualified Voter Who Is Actually Unable to Be Present at the Polls on Election Day Because of Judicial Commitment to Jail in the County of His Residence, While Awaiting Trial on an Alleged Criminal Charge.

Illinois, by statute, grants an absentee ballot to a person who will be unable to be present at the polls on election day because of either absence from the county, physical incapacity for medical reasons or observance of a religious holiday. Chapter 46, Sections 19-1, 19-2 and 19-3, Ill. Rev. Stat. By implication, Illinois denies an absentee ballot to a registered and qualified voter who is actually unable to be present at the polls on election day because of judicial commitment to jail in the county of his residence, either without bail or for failure to post monetary bail, while awaiting preliminary hearing or trial on an alleged criminal charge.

In *McDonald* v. *Board of Election Commissioners*, 265 F. Supp. 816 (N.D. Ill. 1967) (hereinafter referred to as "McDonald I") the Court held that Equal Protection of the Laws forbids the denial of a timely application for an absentee ballot to a registered and qualified voter who was

incarcerated in the county of his residence on election day, while awaiting trial on an alleged criminal charge. The District Judge there relied upon this Court's decision in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), wherein it was said:

> [O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 665.

Judge Lynch, in *McDonald I*, observed that if petitioner were incarcerated in some county other than the one in which he resides, he would be entitled to an absentee ballot as a person unable to be present at the polls because of absence from the county. 265 F. Supp. at 818-19.[1]

Judge Lynch further noted,

> that petitioner McDonald, a citizen, a qualified voter, is no more nor no less so whether his physical incapacity to be present at the polls stems from organic illness or from physical confinement on charges of which he is presumed innocent until proven otherwise. *Id.* at 818.

> It is, of course, the right of the State of Illinois to impose reasonable restrictions on the availability of the ballot. The absence of statutory provisions to accommodate persons unable to be present at the polls on election day perhaps would pose no constitutional prob-

[1] This fact belies any possible suggestion that denial of jail inmate voting by absentee ballot can be justified by considerations of institutional security.

lem. But once the right to vote by absentee ballot has been provided, there must be no arbitrary or discriminatory denial. *Id.* at 817.

In *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886), this Court referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." In *Reynolds* v. *Sims*, 377 U.S. 533, 561-62 (1964), this Court said:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

The right to vote is "close to the core of our constitutional system", *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965), and "vital to the maintenance of democratic institutions". *Id.* at 94. It is "precious" and "fundamental". *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966). "[A]ny restrictions on that right strike at the heart of representative government". *Reynolds* v. *Sims*, *supra*, at 555. Neither homesite nor occupation "affords a permissible basis for distinguishing between qualified voters within the State." *Gray* v. *Sanders*, 372 U.S. 368, 380 (1963).

A classification drawn in a statute must be reasonable in light of its purpose. *McLaughlin* v. *Florida*, 379 U.S. 184, 191 (1964). Careful analysis reveals that the Illinois statutory classification between voters who are medically incapacitated, or are out of the county, or are religiously

incapacitated on election day, on the one hand, and voters who are judicially incapacitated, by reason of commitment to jail, while awaiting trial, in the county of their residences, on the other, is arbitrary and an invidious discrimination, and bears no rational or reasonable relation to the salutary purpose of granting absentee ballots to all qualified registered voters who are actually incapable of being present at the polls on election day.

The Board of Election Commissioners, in its motion to affirm, points to the fact that other possibly meritorious classes of persons are not provided absentee ballots in Illinois. However, plaintiffs are not in a position similar to such persons as mothers of small children unable to afford a babysitter on election day, or breadwinners unable to afford to take time off from their employment without pay, in order to go to the polls. For the abovementioned groups, it is merely the general conditions of society which make it inconvenient for them to vote in person. In contrast, a jail inmate is detained by the specific act of a state official, a judge, who orders his incarceration in default of bail. Moreover, a prisoner, like a soldier stationed far from home without leave, would be forced to defy and break the law—escape jail or go A.W.O.L.—in order to attend the polls. These are significant differences. The mother or breadwinner is not forced to break the law in order to vote. Nor is the mother or breadwinner restrained by state action from leaving the house or job.

It would appear that plaintiffs are in substantially similar circumstances as members of the classes to whom the privilege of voting by absentee ballot has been extended. Citizens incarcerated in the county of their residences are just as actually incapable of going to the polls, if not more

so, as persons who are physically disabled by illness or injury, or persons who will be out of the county (either in or out of jail), or persons with religious scruples.

It would appear that once a man is convicted, he may be lawfully disenfranchised. Chapter 46, Section 3-5, Ill. Rev. Stat.; *People* v. *DeStefano*, 64 Ill. App. 2d 389, 212 N.E. 2d 357, cert. denied, 385 U.S. 821 (1966); *Green* v. *Board of Elections*, 380 F. 2d 445 (2d Cir. 1967), cert. denied, 389 U.S. 1048 (1968); *Otsuka* v. *Hite*, 64 Cal. 2d 596, 51 Cal. Rptr. 284, 414 P. 2d 412 (1966).

However, as Judge Lynch observed:

> There obviously was no intent on the part of the legislature of the State of Illinois to disenfranchise persons in the position of the petitioner. Chapter 46, Section 3-5 of the Illinois Revised Statutes provides that a person loses the right to vote when he is *convicted and sentenced*. This petitioner has neither been convicted nor sentenced, and indeed he is presumed to be innocent of the offense with which he is charged. *McDonald I*, *supra*, at 818.

Judge Lynch was not able to ascertain any legitimate compelling state interest which might be served by denying plaintiffs the right to vote by absentee ballot; nor is one readily apparent. "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington* v. *Rash*, 380 U.S. at 96. Indeed, it would actually appear to be far less burdensome to the State to provide absentee ballots for qualified prisoners than to attempt to utilize such devices as writs of habeas corpus ad votandum directing deputy sheriffs to accompany jail inmates to the polls of their election

precincts on election day. The interests of the State would thus appear to be served, rather than frustrated, by the granting of absentee ballots to registered and qualified voters who are confined in the county of their residences while awaiting preliminary hearing or trial on alleged criminal charges.

It may be assumed, arguendo, that the necessity of assuring the presence of accused persons at trial may justify some pre-trial detention of defendants for failure to provide bail or for lack of bail. It does not follow, however, that a citizen may be stripped of all fundamental human rights while confined to answer to charges of which he is presumed to be innocent.

Not every consequence of pre-trial detention is constitutionally permissible. Those restraints which are not an essential part of the management of a prison, and which are not reasonably related to the only legitimate purpose of detention—security, can not be justified, particularly when they infringe upon fundamental freedoms. See, generally, Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. Pa. L. Rev. 1125, 1144-46 (1965). No one could seriously contend that inmate voting by absentee ballot would jeopardize the security of a prison; certainly there is nothing in the record of this case or in the two previous cases involving this same issue to suggest that denial of absentee ballots to incarcerated qualified voters awaiting trial is essential to the proper management of the Cook County Jail or of any other penal institution. If anything, inmate morale improved when absentee ballots were cast at the Cook County Jail, pursuant to orders of the United States District Court for the Northern District of Illinois,

Eastern Division, in November, 1966,[2] February, 1967,[3] and March, 1967.[4]

It seems clear that denial of an absentee ballot to a qualified voter incarcerated in the county of his residence has no rational relationship to either the proper maintenance of security and order within a penal institution, or to any other legitimate state interest. The Court below erred in upholding, as reasonable, the legislative classification which deprives plaintiffs of absentee ballots.

II.

Refusal by One Branch of Government, an Election Board, to Grant an Absentee Ballot to a Registered and Qualified Voter Who Is Actually Unable to Be Present at the Polls on Election Day Because of Commitment to Jail by Another Branch of Government, the Judiciary, Due to Financial Inability to Provide Monetary Bail, While Awaiting Preliminary Hearing or Trial, Effectively Constitutes Deprivation of the Right to Vote Based Upon Poverty, in Violation of the Equal Protection Clause.

An additional argument for absentee ballots exists for those prisoners who are incarcerated due to their financial inability to post 10% cash of monetary bail. The judicial act of commitment for failure to provide non-excessive bail, standing alone, might not present any constitutional problem, so long as absentee voting is available. But the addi-

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[2] *Norman Bonds* v. *Board of Election Commissioners, et al.*, No. 66 C 2012 (N.D. Ill. Nov. 4, 1967) (unreported).

[3] *McDonald I.*

[4] A. 13.

tional act of a state agency, an Election Board, in denying a timely request for an absentee ballot, taken together with the judicial commitment order, constitutes joint state action, which operates as effectively as a poll tax to disenfranchise poor voters, which this Court condemned, in *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), as violative of the Equal Protection Clause of the Fourteenth Amendment.

It is not here suggested that courts are required to redress all inequalities in society. But where, as here, official state action prevents a voter from attending the polls, and further denies his timely request for an absentee ballot, for reasons which cannot bear scrutiny under the Equal Protection Clause, then judicial redress is justified.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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APPENDIX

Chapter 46, Section 19-1, Ill. Rev. Stat., provides:

> Any qualified elector of the State of Illinois (other than one to whom an absentee ballot has been delivered or mailed pursuant to Article 20 of this Act) having duly registered where such registration is required who expects to be absent from the county in which he is a qualified elector or who because of physical incapacity or the tenets of his religion in the observance of a religious holiday will be unable to be present at the polls on the day of holding any special, general or primary election at which any presidential preference is indicated or any candidates are chosen or elected, for any Congressional, State, District, County, Town, City, Village, Precinct or Judicial offices or at which questions of public policy are submitted, may vote at such election as hereinafter in this Article provided.

Chapter 46, Section 19-2, Ill. Rev. Stat., provides:

> Any elector as defined in the foregoing section expecting to be absent from the county of his residence or any such elector who because of physical incapacity or the tenets of his religion in the observance of a religious holiday will be unable to be present at the polls on the day of such election may by mail, not more than 30 nor less than 5 days prior to the date of such election, or by personal delivery not more than 30 nor less than 3 days, prior to the date of such election, make application to the county clerk or, where existing, to the Board of Election Commissioners, or other officer or officers charged with the duty of furnishing ballots for such election in his voting precinct, for an official ballot for such precinct to be voted at such election provided, any such elector who will be absent because of physical incapacity shall submit with his application the certifi-

cate of his duly licensed attending physician or a Christian Science practitioner living and residing in the State of Illinois, who is listed in the Christian Science Journal to the fact that such elector is so physically incapacitated.

Chapter 46, Section 19-3, Ill. Rev. Stat., provides:

Application for such ballot shall be made on blanks to be furnished by the county clerk or the Board of Election Commissioners or other officer or officers charged with the duty of furnishing ballots as aforesaid, as the case may be, and shall be substantially in the following form:

Affidavit and Application for Ballot by Elector Who Expects to Be Absent From County

To be voted at the ..... election in the county of ..... and State of Illinois, in the ..... precinct of the (1)* township of ..... (2)* City of .... or (3)* ..... ward in the City of ..... .

State of .....)
) ss.
County of .....)

I, ..., do solemnly swear that I am a resident of the ..... precinct of the (1)* township of .... (2)* City of ..... or (3)* .....ward in the city of ..... residing at ..... in such city or town in the county of ..... and State of Illinois; that I have lived at such address for ..... months last past; that I am lawfully entitled to vote in such precinct at a ..... election to be held therein on .....; that I expect to be absent from the county of my residence on the date of holding such election, and that I will have no opportunity to vote in person on that day.

* fill in either (1), (2) or (3).

I hereby make application for an official ballot or ballots to be voted by me at such election if I am absent from the county of my residence, and I agree that I shall return such ballot or ballots to the official issuing the same in sufficient time for such official to deliver such ballot or ballots to the polls on the date of the election.

.....

Post office address to which ballot is mailed:

.....

Subscribed and sworn to by ..... who is personally known to me, before me this ..... day of .... A.D. ..... .

.....

Official Capacity

(Penalty clause set out in full)

Affidavit and Application for Ballot by Physically Incapacitated Elector

To be voted at the ..... election in the County of ..... and State of Illinois, in the ..... precinct of the (1)* township of ..... (2)* City of .... or (3)* ..... ward in the City of ..... .

State of .....)
) ss.
County of .....)

I, ... do solemnly swear that I am affiliated with the ..... party (to be used in primary elections) and that I am a resident of the ..... precinct of the (1)* township of ..... (2)* City of .... or (3)* ..... ward in the city of ..... residing at ..... in such city or town in the county of ..... and State of Illinois; that I have lived at

---

* fill in either (1), (2) or (3).

such address for ..... months last past; that I am lawfully entitled to vote in such precinct at a ..... election to be held therein on .....; that I shall be physically incapable of being present at the polls of such precinct on the date of holding such election for the following reasons:

I hereby make application for an official ballot or ballots to be voted by me at such election if I am so physically incapacitated, and I agree that I shall return such ballot or ballots to the official issuing the same in sufficient time for such official to deliver such ballot or ballots to the proper polling place prior to the closing of the polls on the date of election.

.....

Post office address to which ballot is mailed:

.....

Subscribed and sworn to by ..... who is personally known to me, this ..... day of ..... A.D. .....

.....

Official Capacity

(Penalty clause set out in full)

Affidavit of Attending Physician

State of .....)
) ss.
County of .....)

I, ... do solemnly swear that I am a physician, duly licensed to practice medicine in the State of Illinois; that I have examined .....; and that I verily believe that he will be physically incapable of being present at the polls on the ..... day of ..... A.D.

..... for the following reasons: .....

.....

.....

(Signature)

.....

(Date licensed)

Subscribed and sworn to by ....., who is personally known to me, before me this ..... day of ...., A.D. ..... .

.....

Official Capacity

Affidavit of Attending Christian Science Practitioner

State of .....)
) ss.
County of .....)

I, ..., do solemnly swear that I am an authorized Christian Science practitioner, listed in the Christian Science Journal, living and residing in the State of Illinois; that I am treating .....; and, that I verily believe that he will be physically incapable of being present at the polls on the ..... day of ....., A.D. 19.... for the following reasons:

..... C.S.

Authorized Christian Science Practitioner

Subscribed and sworn to before me by ..... who is personally known to me, this ..... day of .... A.D. ..... .

.....

Official Capacity

(Penalty clause set out in full)

Affidavit and Application for Ballot by Elector Observing Religious Holiday

To be voted at the ..... election in the county of ..... State of Illinois, in the ..... precinct (1)* township of ..... (2)* City of ..... or (3)* ..... ward in the City of .....

State of .....)
) ss.
County of .....)

I, ... do solemnly swear that I am affiliated with the ..... party (to be used in primary elections) and that I am a resident of the ..... precinct of the (1)* township of ..... (2)* City of .... or (3)* ..... ward in the city of ..... residing at ..... in such city or town in the county of ..... and State of Illinois; that I have lived at such address for ..... months past, that I am lawfully entitled to vote in such precinct at a ..... election to be held therein on .....; that I shall be unable to be present at the polls of such precinct on the date of holding such election because of the tenets of my religion in the observance of a religious holiday.

I hereby make application for an official ballot or ballots to be voted by me at such election if I am so unable to be present at the polls of such precinct on the date of the election because of the tenets of my religion in the observance of a religious holiday, and I agree that I shall return the ballot or ballots to the official issuing the same in sufficient time for such official to deliver the ballot or ballots to the proper polling place prior to the closing of the polls on the date of the election.

.....

Post office address to which ballot is mailed:

.....

* fill in either (1), (2) or (3).

Subscribed and sworn to by ..... who is personally known to me, this ..... day of ..... A.D. .....

.....

Official Capacity

(Penalty clause set out in full)

Provided, that if application be made for a primary election ballot, such application shall designate the name of the political party with which the applicant is affiliated.

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUL 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 68

SAM L. McDONALD AND ANDREW BYRD, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, CHAIRMAN, MARIE H. SUTHERS, COMMISSIONER, AND FRANCIS P. CANARY, COMMISSIONER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF OF APPELLEES.

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THE DARNELL-GARDEN PRINTING COMPANY, CHICAGO [redacted] 68

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1372.

SAM L. McDONALD AND ANDREW BYRD, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,
Plaintiffs-Appellants,

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, CHAIRMAN, MARIE H. SUTHERS, COMMISSIONER, AND FRANCIS P. CANARY, COMMISSIONER,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

BRIEF OF APPELLEES.

QUESTION PRESENTED.

Does the failure of the absentee voting provisions of the Illinois statute to authorize the issuance of absentee ballots to unconvicted inmates of a penal institution incarcerated due to unavailability of bail or financial inability to post bond pending trial while extending such a privilege to individuals unable to personally attend the polls for reasons of absence from the county, physical incapacity for medical reasons, or observance of a religious holiday render those statutes unconstitutional as denying the appellants the equal protection of the laws guaranteed them by the Fourteenth Amendment to the Constitution of the United States of America?

ARGUMENT.

I.

APPELLANTS ARE NOT IN SUBSTANTIALLY SIMILAR CIRCUMSTANCES AS MEMBERS OF THE CLASSES TO WHOM THE PRIVILEGE OF VOTING BY ABSENTEE BALLOT HAS BEEN EXTENDED.

The precise question involved in this appeal does not appear to have been presented to this Court before. Previous cases involving the franchise have involved questions of apportionment or the qualifications of voters. No such issues are involved in this appeal. The question here involved is the extension of the privilege of absentee voting to classes of individuals unable to personally attend the polls. Absentee voting statutes have been consistently construed by the state Courts as a privilege extended electors and not an absolute right. *Frink* v. *State,* 160 Fla. 394, 35 So. 2d 10 (1948); *Crowe* v. *Emmert,* 305 S. W. 2d 272 (Kentucky 1957); *Ragan* v. *Burnett,* 305 S. W. 2d 759 (Kentucky 1957); *Ragan* v. *Burnett,* 306 S. W. 2d 281 (Kentucky 1957); *Hallahan* v. *Mittlebeeler,* 373 S. W. 2d 726 (Kentucky 1963); *Wichelmann* v. *Glencoe,* 200 Minn. 62, 273 N. W. 638 (1937); *Wheelock* v. *Haney,* 138 Neb. 547, 293 N. W. 418 (1940); *McMaster* v. *Wilkinson,* 145 Neb. 39, 15 N. W. 2d 348 (1944); *Miller* v. *Mersch,* 152 Neb. 746, 42 N. W. 2d 652 (1950); *De Flesco* v. *Mercer County Board of Elections,* 43 N. J. Super. 492, 129 A. 2d 38 (1957); *Portmann* v. *Board of Elections,* 60 Ohio App. 54, 19 N. E. 2d 531 (1938); *Brown* v. *Dakota Public Service Company,* 68 S. D. 169, 299 N. W. 569 (1941); *Fugate* v. *Buffalo,* 348 P. 2d 76 (Wyoming 1959).

Essentially the equal protection guarantee requires that

all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. *Hartford Steam Boiler Inspection and Insurance Company* v. *Harrison,* 301 U. S. 459, 81 L. Ed. 1223, 57 S. Ct. 838. Every qualified voter unable to cast his ballot in person need not be furnished an absentee ballot. Mere classification does not of itself deprive a group of equal protection. *Williamson* v. *Lee Optical Company,* 348 U. S. 483, 75 S. Ct. 461, 99 L. Ed. 563; *Carrington* v. *Rash,* 380 U. S. 89, S. Ct. 775. All legislation involves some classification; discrimination, not differentiation is prohibited. "The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *McLaughlin* v. *State of Florida,* 379 U. S. 184, 191; 85 S. Ct. 283, 288. "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised . . .", *Lassiter* v. *Northampton County Board of Elections,* 360 U. S. 45, 50; 79 S. Ct. 985, 989 (1959). Only "invidious discrimination" is forbidden. *Reynolds* v. *Sims,* 377 U. S. 533, 94 S. Ct. 1362; *Harper* v. *Virginia State Board of Elections,* 383 U. S. 663, 86 S. Ct. 1079. "Minors, felons and other classes may be excluded." *Gray* v. *Sanders,* 372 U. S. 368, 380, 83 S. Ct. 801, 809.

Classification is not susceptible to an exact exclusion or inclusion of persons. It is almost impossible in many situations to forsee and provide for every imaginable and exceptional case and a legislature ought not be required to do so at the risk of having its legislation declared void. *Ozan Lumber Company* v. *Union County National Bank,* 207 U. S. 251, 52 L. Ed. 195, 28 S. Ct. 89. A classification does not offend the Equal Protection Guarantee merely because it is not made with mathematical nicety or because in practice it results in some inequality. *Morey* v. *Doud,* 354 U. S. 457, 1 L. Ed. 2d 1485, 77 S. Ct. 1344. Accidental

inequality is one thing; intentional and systematic discrimination is another. *First National Bank* v. *Albright*, 208 U. S. 548, 52 L. Ed. 614, 28 S. Ct. 349.

Several state courts have had an opportunity to consider the question of the constitutionality of absentee voter statutes in the light of equal protection objections, and have consistently rejected those objections. *Straughan* v. *Meyers*, 187 S. W. 2d 1159 (Missouri 1916); *Lemons* v. *Noller*, 63 P. 2d 177 (Kansas 1936). In *Hallahan* v. *Mittlebeeler*, 373 S. W. 2d 726 (Kentucky Court of Appeals 1963) the Court rejected similar objections. The Kentucky statute in question established two general classes of voters eligible to vote by absentee ballot consisting of persons serving the federal government and their spouses and dependents and full time students absent from the county of their residence on the day of election. The statute was challenged as failing to provide absentee ballots to others who were qualified voters and similarly absent from the county on the date of the election. The Court stated:

> "Admittedly they do not include many otherwise qualified voters who might normally be absent from the county of their residence on the day of an election. However, we perceive that the Legislature extended the privilege of absentee voting to persons living away from their county of legal residence who may be expected to retain their voting residence in Kentucky and who cannot conveniently and economically return to their home county on election day. The two classes selected by the Legislature appear to be the only large identifiable classes that accomplish the object of this legislation even though they do not do so with mathematical accuracy. That there will be exceptional circumstances in individual cases does not, of course affect the validity of the basic classifications . . . . Classification must have relation to the purpose of the Legislature: But logical appropriateness of the inclusion or exclusion of objects or persons is not required

> . . . At any rate, exact wisdom and nice adaptation of remedies are not required by the Fourteenth Amendment."

The Illinois legislature has extended the privilege of voting by absentee ballot to three categories of persons:

1. Absence from the county.
2. Physical incapacity for medical reasons.
3. Observance of religious holiday.

(Section 19-1, 19-2 and 19-3, Chapter 46, Illinois Revised Statutes (1967). Full text in appendix to Appellants' Brief pages 15-24). The plaintiffs clearly do not fall within any of these classes. Other possibly meritorious classes of persons are not provided for—cloistered nuns, mothers of small children unable to afford or procure someone to watch their children on Election Day, breadwinners unable to afford to take time off from their employment without pay. The crucial question would appear to be whether the plaintiffs are in substantially similar circumstances as members of the classes to whom the privilege of voting by absentee ballot has been extended.

The plaintiffs are not similarly situated and that the failure of the Legislature to provide them with absentee ballots does not deny them equal protection of the laws. The plaintiffs do not complain and indeed constitutionally cannot complain of substantially different treatment from that afforded persons who are not under restraint. One of the named plaintiffs is not entitled to bail because of the nature of the offense with which he is charged, and he does not complain of the unavailability of bail. The other named plaintiff alleges that he is financially unable to post the bail fixed but he does not contend that the amount set is unreasonable.

A prisoner is a person who is deprived of his liberty by virtue of judicial or other lawful process. Prisoners are

not able to move about as they please. They cannot attend the church of their choice, nor are religious services of all denominations available to them. They are permitted visitors only at certain times and places and then only under watchful eyes. They are not permitted to select their own menus even if able to afford to purchase whatever they choose. They may be required to wear uniform clothing. They are permitted to eat, sleep and exercise only at specified times. Entertainment is limited. For violation of disciplinary rules they may be placed in solitary confinement or their rations may be limited. None of these deprivations have been successfully challenged as violating the equal protection of the laws.

Prisoners awaiting trial are not in substantially similar circumstances as members of the classes to whom the privilege of voting by absentee ballot has been extended by the Legislature. No invidious discrimination is present.

II.

APPELLANTS ARE NOT DEPRIVED OF THE RIGHT TO VOTE BY REASON OF POVERTY.

Appellants attempt to persuade the Court that the cart is pulling the horse. No complaint is made that they are unlawfully restrained or that the unavailability of bail or their inability to post reasonable bail deprives them of any rights guaranteed them by the Constitution of the United States. Instead they complain of one of the many consequences of lawful restraint—their inability to be physically present at the polls on election day. They attempt to come within the purview of *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 86 S. Ct. 1079. Appellants confuse cause with effect. If they do not complain about the lawfulness of their restraint, how can they complain about one of the incidents of lawful restraint, their inability to come

and go as they please? Need prisoners be afforded privileges when they can be denied liberty?

Appellants cite with favor two decisions of the United States District Court for the Northern District of Illinois. *Norman Bonds* v. *Board of Election Commissioners* (Unreported—66C2012 D. C. N. D. Ill. November 4, 1966); *McDonald* v. *Board of Election Commissioners,* 265 F. Supp. 816 (D. C. N. D. Ill. 1967). A demand for an absentee ballot in each of these cases was presented to the election authorities on the last day permitted for application for absentee ballots. The demands were refused. Lawsuits were immediately instituted. The defendants were permitted the luxury of a single night to prepare responsive pleadings. Hearings were hastily conducted the next day. In each instance a decision was rendered hours thereafter. Effective judicial review was precluded. In *McDonald I* an application for stay of enforcement of judgment was denied by the trial court, subsequently denied by the United States Court of Appeals for the Seventh Circuit after a weekend had elapsed and defendants' appeal was shortly thereafter dismissed as moot. The instant case was decided after extensive briefs were submitted and lengthy arguments were conducted. Is haste to be preferred to due deliberation? The gist of the District Court decisions referred to above is that there was no intention on the part of the Illinois Legislature to disenfranchise prisoners awaiting trial. It is equally clear that the Illinois Legislature did not intend to extend the privilege of absentee voting to prisoners awaiting trial. No intentional discrimination is present. The legislature extended the privilege of absentee voting to the largest ascertainable classes of individuals unable to be personally present at the polls.

III.

THE RELIEF REQUESTED BY THE APPELLANTS IS BEYOND THE POWER OF A COURT TO GRANT.

The privilege of voting by absentee ballot can be extended to new classes of individuals only by a legislature and not by a court. The privilege of voting by absentee ballot is strictly regulated by statute and violations of these regulations are punishable by severe criminal penalties (Article 29A, Sec. 1, 3 and 5; Chapter 46, Illinois Revised Statutes, Appendix Page 9). These penalties attach only to applications accompanied by affidavits prescribed by the statute and not to some substitute which might be tolerated. The criminal sanctions were intended to insure that an individual voting by absentee ballot cast his ballot independently and in secret. To permit absentee balloting without these safeguards would permit fraudulent voting at political headquarters without any criminal sanctions attaching.

In the event that the statutes involved were declared unconstitutional, the appellants would not be entitled to relief. The result of a decision declaring the statutes unconstitutional would be to deny to all qualified voters the privilege of voting by absentee ballot. The effect of such a decision would be analogous to throwing the baby out with the bath water or to alleviating the inequities created by poverty by reducing everyone to the status of a beggar.

CONCLUSION.

For the reasons above stated, the decision below ought to be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 68

SAM L. McDONALD and ANDREW BYRD, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants,

vs.

BOARD OF ELECTION COMMISSIONERS OF CHICAGO, SIDNEY T. HOLZMAN, Chairman, MARIE H. SUTHERS, Commissioner, and FRANCIS P. CANARY, Commissioner,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

REPLY BRIEF OF APPELLANTS

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

REPLY BRIEF OF APPELLANTS

I.

The Illinois Absentee Voters Law Does Not Meet the Requirements of Equal Protection of the Laws.

The significance of the Board of Election Commissioners' characterization of absentee voting in Illinois as a "privilege" rather than a "right" is unclear. Clearly, the exercise of the franchise, by whatever means—mail or in person—

cannot be denied arbitrarily, or for some constitutionally irrelevant reason. *Brown* v. *Post*, 279 F. Supp. 60 (W.D. La. 1968) (absentee voting-discrimination on basis of race); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (voting in person-discrimination on basis of wealth).

The central question is whether a classification used to disenfranchise a class of citizens is consistent with the Equal Protection Clause. States have broad power to differentiate. But, in the area of voting, which is preservative of other basic civil and political rights, any infringement must be carefully and meticulously scrutinized.

Citizens detained behind bars, while awaiting preliminary hearing or trial on alleged criminal (or civil) charges, are just as incapable of getting to the polls on election day as persons who are granted absentee ballots in Illinois (ill, religious, out-of-county, and election judges).

The Board of Election Commissioners has failed to articulate what legitimate state interest might be served by denying absentee ballots to registered and qualified voters, who are actually incapable of being present at the polls, because of temporary commitment to jail in the county of their residence, while awaiting preliminary hearing or trial. Surely, such disenfranchisement cannot be justified by the need to maintain institutional order and security; voting helps, rather than hurts, prison morale. Moreover, prisoners detained outside the county of their residence are entitled to vote by mail in Illinois. Indeed, in at least two other states, the Attorney General has explicitly upheld the right of prisoners, not convicted of a felony, to vote by absentee ballot. See, Rep. Atty. Gen. Maine 1961-62 pp. 183-84; Rep. Atty. Gen. Minnesota 1930 p. 215, No. 229.

Upon analysis, it is clear that the discrimination practiced in Illinois against voters incarcerated in the county of their residence is arbitrary and irrational.

II.

Incarcerated Citizens, Who Are Registered and Qualified to Vote, Are Constitutionally Entitled to Cast Their Ballot by Mail, in Order to Avoid an Impermissible Consequence of Pre-Trial Detention.

Long ago, a prisoner was regarded by the law as a slave of the state. *Ruffin* v. *Commonwealth*, 62 Va. (21 Grath) 790, 792 (1871). In modern times, there is growing recognition that "(a) prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law." *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944).

This Court has never sanctioned the absolute denial of basic, fundamental, human rights, merely because a citizen is imprisoned. *Cooper* v. *Pate*, 378 U.S. 546 (1964). Given the presumption of innocence, secured after centuries of struggle, it is logical that the rights of the pre-trial detainee should be at least equal to, if not greater than, the rights of the convict.

Recently, increased concern has been shown by persons working in the criminal process with the terms and conditions of pre-trial incarceration. See generally, Foote, *The Coming Constitutional Crisis In Bail: II*, 113 U. Pa. L. Rev. 1125 (1965). This Court has not yet had the opportunity to decide which, if any, consequences of pre-trial detention are constitutionally justifiable. Of the various

deprivations suffered upon confinement, loss of the ballot is perhaps the most flagrant (in the hierarchy of constitutional freedoms) and the least justifiable (from the viewpoint of the state's legitimate interests).

Appellants do not suggest that prisoners qualified to vote be marched to the polls by the Sheriff on election day. Rather, where the State has established a workable system of voting by mail, and the casting of an absentee ballot does not interfere with the maintenance of institutional order and security, then qualified prisoners confined in the county of their residence are entitled to be furnished absentee ballots.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 68.—October Term, 1968.

Sam L. McDonald et al., Appellants, *v.* Board of Election Commissioners of Chicago. | On Appeal From the United States District Court for the Northern District of Illinois, Eastern Division.

[April 28, 1969.]

Mr. Chief Justice Warren delivered the opinion of the Court.

Appellants and the class they represent are unsentenced inmates awaiting trial in the Cook County jail who, though they are qualified Cook County electors, cannot readily appear at the polls either because they are charged with nonbailable offenses or because they have been unable to post the bail imposed by the courts of Illinois.[1] They cannot obtain absentee ballots, for they constitute one of a number of classes for whom no provision for absentee voting has yet been made by the Illinois Legislature. The constitutionality of Illinois' failure to include them with those who are entitled to vote absentee is the primary issue in this direct appeal from a three-judge court.

The specific provisions attacked here, Ill. Rev. Stat., c. 46, §§ 19–1 to 19–3, have made absentee balloting available to four classes of persons: (1) those who are absent from the county of their residence for any reason whatever; (2) those who are "physically incapacitated," so long as they present an affidavit to that effect from a

[1] At the time of bringing suit, appellant McDonald was being held without bail on a charge of murder; his subsequent trial resulted in a hung jury, and he then pleaded to a reduced charge of manslaughter, a bailable offense. Appellant Byrd, who was discharged after his robbery complaint was dismissed at his preliminary hearing, had been held because of his inability to post a $5,000 bond.

licensed physician; (3) those whose observance of a religious holiday precludes attendance at the polls; and (4) those who are serving as poll watchers in precincts other than their own on election day.[1] The availability of the absentee ballot in Illinois has been extended to its present coverage by various amendments over the last 50 years. Prior to 1917, Illinois had no provision for absentee voting, requiring personal attendance at the polls, and in that year the legislature made absentee voting available to those who would be absent from the county or business or other duties. In 1944 absentee voting was made available to all those absent from the county for any reason. The provisions for those remaining in the county but unable to appear at the polls because of physical incapacity, religious holidays, or election duties were added in 1955, 1961, and 1967, respectively.

On March 29, 1967, appellants made timely[2] application for absentee ballots for the April 4 primary because

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[1] Section 19–1 of the Illinois Election Code identifies those persons who can apply for absentee ballots. Section 19–2 provides for the time and manner in which such application must be made, including the requirement that affidavits from a licensed attending physician or a Christian Science practitioner accompany applications from those physically incapacitated. Section 19–3 sets out the format of the applications and accompanying affidavits. In addition to their allegations that these provisions violate equal protection, appellants also sought below a ruling that appellee Board, in interpreting these laws, had misconstrued them not to include judicially incapacitated persons. Reading § 19–1 together with § 19–2, the District Court concluded that appellants were not included within the coverage of the provisions, and this statutory construction is not challenged here.

[2] Appellants do not challenge the provisions setting out the time within which the applications must be made and thus concede that those persons incarcerated just prior to election day are not entitled to an absentee ballot.

of their physical inability to appear at the polls on that election day. The applications were accompanied by an affidavit from the warden of Cook County jail attesting to that inability. These applications were refused by the appellee Board of Election Commissioners on the ground that appellants were not "physically incapacitated" within the meaning of §§ 19–1 and 19–2 of the Illinois Election Code. On the same day appellants filed a complaint, alleging that they were unconstitutionally excluded from the coverage of the absentee provisions. They requested that a three-judge court be convened to rule the provisions violative of equal protection insofar as the the provisions required denial of an absentee ballot to one judicially incapacitated while making it available at the same time to one medically incapacitated; and they sought an injunction to restrain appellee Board "from refusing to grant [appellants'] timely applications for absentee ballots." The District Court granted appellants' request for temporary relief on March 30, before the three-judge court was convened, and ordered the Board to issue ballots to qualified Illinois electors awaiting trial in the Cook County jail.[4] Both parties then filed motions for summary judgment, the Board asserting

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[4] The grant of temporary relief was based in part on an earlier suit brought by appellant McDonald in the District Court for such equitable relief as would allow him to vote in the February 28, 1967, primary and aldermanic election in Chicago. In ordering the Board to furnish appellant with an absentee ballot for that election, the one-judge court noted that Illinois statutes specifically disenfranchised only those who were convicted and sentenced (Ill. Rev. Stat., c. 46, §§ 3–5 (1968)), that persons awaiting trials in jails in counties other than their resident counties could qualify for an absentee ballot as one "absent from the county in which he is a qualified elector," and that the Illinois Legislature did not intend to exclude individuals in appellant's circumstances from among those "physically incapacitated." *McDonald* v. *Board of Election Commissioners of Chicago*, 265 F. Supp. 816 (1967).

that to honor the applications would subject its members to criminal liability under Illinois law.[5]

On December 11, the District Court granted summary judgment for the Board, holding that the Illinois provisions extending absentee voting privileges to those physically incapacitated because of medical reasons from appearing at the polls constituted a proper and reasonable legislative classification not violative of equal protection. The case was brought here by appellants on direct appeal, 390 U. S. 1038 (1968), and we affirm.

Appellants argue that Illinois' absentee ballot provisions violate the Equal Protection Clause of the Fourteenth Amendment for two reasons. First, they contend that since the distinction between those medically incapacitated and those "judicially" incapacitated bears no reasonable relationship to any legitimate state objective, the classifications are arbitrary and therefore in violation of equal protection. Secondly, they argue that since pretrial detainees imprisoned in other States or in counties within the State other than those of their own residence can vote absentee as Illinois citizens "absent from the county for any reason," it is clearly arbitrary to deny the absentee ballot to other unsentenced inmates simply because they happened to be incarcerated within their own resident counties. Underlying appellants' contentions is the assertion that since voting rights are involved, there is a narrower scope for the operation of the presumption of constitutionality than would ordinarily be the case with state legislation challenged in this Court. See *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886).

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[5] Ill. Rev. Stat., c. 46, §§ 29A-1, 29A-5 (1967), provide for penalties of up to five years' imprisonment, or a fine not to exceed $5,000, or both, for violating the Illinois Election Code. Although there are no controlling Illinois cases, neither party contends here that the absentee ballot provisions are permissive only, allowing the grant of absentee ballots to any one not specified in the statute.

Before confronting appellants' challenge to Illinois' absentee provisions, we must determine initially how stringent a standard to use in evaluating the classifications made thereunder and whether the distinctions must be justified by a compelling state interest; for, appellants assert that we are dealing generally with an alleged infringement of a basic, fundamental right. See, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 (1966). Thus, while the "States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised," *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50 (1959), we have held that once the States grant the franchise, they must not do so in a discriminatory manner. See *Carrington* v. *Rash*, 380 U. S. 89 (1965). More importantly, however, we have held that because of the overriding importance of voting rights, classifications "which might invade or restrain them must be closely scrutinized and carefully confined" where those rights are asserted under the Equal Protection Clause; *Harper* v. *Virginia State Board of Elections*, *supra*, at 670. And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, *Harper* v. *Virginia Board of Elections*, *supra*, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny. *Douglas* v. *California*, 372 U. S. 353 (1963); *McLaughlin* v. *Florida*, 379 U. S. 184, 192 (1964).

Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not

the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise; nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statutes specifically disenfrancise only those who have been convicted and sentenced, and not those similarly situated to appellants. Ill. Rev. Stat., c. 46, §§ 3–5 (1968). Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption, that Illinois has in fact precluded appellants from voting.[6] We are then left with the more traditional standards for evaluating appellants' equal protection claims.[7] Though the wide

[6] Appellants agree that the record is barren of any indication that the State might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own.

[7] Appellants make two additional claims here, which were asserted below and which are unrelated to their argument based on the statute and its alleged denial of equal protection. They allege first that wholly apart from the absentee provisions, they are constitutionally entitled to cast their ballots by mail in order to avoid an impermissible consequence of pretrial detention. They argue that of all voters they are the only class forcibly restrained by the State from attending the polls in person; and they contend that they should get an *absentee* ballot only because Illinois has set up such a system, obviating any necessity to march them to the polls under armed guard—a procedure they concede would be disruptive and expensive. Appellants claim secondly that to the extent that they cannot afford the posted bail, they are being denied their right to vote solely because of their indigency, contrary to *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966). Since there is nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State, see n. 6, *supra*, we need not reach these two contentions.

leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. See *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911). With this much discretion, a legislature traditionally has been allowed to take reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind," *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Ozan Lumber Co.* v. *Union County National Bank*, 207 U. S. 251 (1907).

Since there is nothing to show that a judicially incapacitated, pretrial detainee is absolutely prohibited from exercising the franchise, it seems quite reasonable for Illinois' Legislature to treat differently the physically handicapped, who must, after all, present affidavits from their physicians attesting to an absolute inability to appear personally at the polls in order to qualify for an absentee ballot. Illinois could, of course, make voting

easier for all concerned by extending absentee voting privileges to those in appellants' class. Its failure to do so, however, hardly seems arbitrary, particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible.[8]

Similarly, the different treatment accorded unsentenced inmates incarcerated within and without their resident counties may reflect a legislative determination that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates. Such a temptation with its attendant risks to prison discipline would, of course, be much less urgent with prisoners incarcerated out of state or outside their resident counties. Constitutional safeguards are not thereby offended simply because some prisoners, as a result, find voting more convenient than appellants.

We are satisfied then that appellants' challenge to the allegedly unconstitutional incompleteness of Illinois' absentee voting provisions cannot be sustained. Ironically, it is Illinois' willingness to go further than many States[9] in extending the absentee voting privileges so

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[8] A number of identifiable groups are not yet entitled to vote absentee under Illinois legislation: those serving on juries within the county of their residence, mothers with children who cannot afford a baby sitter, persons attending ill relations within their own county, servicemen stationed in their own counties, doctors who are often called on to do emergency work, and businessmen called away from their precincts on business. On the other hand, any person in the above groups, including an unsentenced prisoner, presumably can get an absentee ballot if he is outside his resident county, ill, or observing a religious holiday.

[9] Only three other States make provision for election duties, and 14 others for religious observance. Several States have gone further than Illinois, Wisconsin making provision for jury duty, Wis. Stat. Ann. § 6.85 (1964), and Alaska, California, and Oregon making

as to include even those attending to election duties that has provided appellants with a basis for arguing that the provisions operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise. Indeed, appellants' challenge seems to disclose not an arbitrary scheme or plan but, rather, the very opposite—a consistent and laudable state policy of adding, over a 50-year period, groups to the absentee coverage as their existence comes to the attention of the legislature. That Illinois has not gone still further, as perhaps it might, should not render void its remedial legislation, which need not, as we have stated before, "strike at all evils at the same time." *Semler* v. *Dental Examiners*, 294 U. S. 608, 610 (1935).

Accordingly, the judgment of the District Court is

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur in the result.

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provision for inaccessibility of polls, Alaska Laws, Tit. 15, § 15.20.010 (1962), Cal. Election Code § 14620 (1961), Oregon Rev. Stat. §§ 253.010 (a), 253.510 (1968). Maine appears to be the only State to allow the absentee ballot for absence from the polls for any "sufficient" reason, Maine Rev. Stat. Ann., Tit. 21, §§ 1251, 1306 (1964).

On the other hand, all States make provisions for the Armed Forces, either expressly or impliedly. All but five States have extended the ballot to the physically disabled; and only six require absence from the State, rather than county or precinct, as a condition. See appellee's survey of state laws, attached to its brief on appeal.